NTSB Order No.
EM-63

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 29th day of July 1977.

OWEN W. SILER, Commandant, United States Coast Guard,

v.

ISIAH REED, Appellant.

Docket ME-60

OPINION AND ORDER

Appellant seeks review of a decision wherein the Commandant affirmed the revocation of his merchant mariner's document No. Z-4392436648-D5 for misconduct.[1] The findings concern appellant's employment as a messman aboard the SS DEL SOL, a United States merchant vessel then engaged on a voyage to African ports.

In prior proceedings, appellant had a full evidentiary hearing before Administrative Law Judge Archie R. Boggs, and appealed from his initial decision to the Commandant (Appeal No. 2068).[2] The appellant elected to represent himself at the hearing. On the appeals, he has been represented by counsel.

The law judge found that appellant wrongfully failed to "turn to" for duty when the vessel was at Matadi, Zaire, on September 28, 1975, and at Port Harcourt, Nigeria, from October 8 to 13, 1975, and failed to join to vessel's sailing from Port Harcourt on October 13. These offenses were recited in six logbook entries made by the master of the SS DEL SOL. After presenting them in evidence, the Coast Guard rested its case.

Appellant likewise relied on documentary evidence, which included his typed statement taken down during the Coast Guard's

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[1]The sanction was entered pursuant to 46 U.S.C. 239(g). An appeal to this Board from the Commandant's action thereon is authorized by 49 U.S.C. 1903(a)(9)(B).

[2]Copies of the decisions of the Commandant and the law judge are attached.

earlier investigation of the case. The essential facts established therein were that the third mate had assaulted the appellant with a knife and threatened to have him killed on October 1, as he boarded the vessel after spending the evening ashore at Boma, Zaire; that when the vessel arrived at Port Harcourt on October 5, appellant told the master that he wished to "get off" because he was afraid for his life but the master refused his request to be taken to Lagos, Nigeria, for that purpose; that appellant's complaint was investigated by a port superintendent on October 8, who thereafter recommended that he should be repatriated; and finally that appellant's repatriation was arranged through the agent of the company which operated the vessel.

The law judge held that this evidence "could not be considered sufficient to rebut" the log entries, to which he had given prima facie weight, and he found no justification shown for appellant's "alleged belief that his life was in danger." (I.D. 11). Evidence that appellant had completed the previous voyage of the DEL SOL was rejected as a ground for claiming the day off on September 28, and his further claim of illness was disregarded. In assessing sanction, the law judge concluded that the offenses which were logged "standing alone would not justify revocation" (I.D. 13). He nevertheless entered that order upon considering appellant's "extensive record" of suspensions and admonitions for similar offenses since 1946 (I.D. 15-16).

In his brief to the Board, appellant contends that the law judge (1) was required by a Coast Guard regulation to provide greater assistance concerning his appeal rights; and that the law judge erred by (2) failing to call witnesses, (3) not ordering a medical examination to verify his claim of illness; and (4) considering past offenses beyond a 3-year period.[3] Appellant also has incorporated his brief before the Commandant wherein he contended, inter alia, that he was "justified in leaving his vessel for reasonable fears for his safety." Counsel for the Commandant has not submitted a reply brief.

Upon review of the entire record, we conclude that the log entries of September 28 and October 8 to 12, 1975, are reliable, probative, and substantial evidence of the offenses recited therein. The law judge's findings based on those entries are adopted as our own. The accuracy and reliability of the entries made on October 13 must be questioned however, because of appellant's undisputed evidence concerning the circumstances under

[3]Appellant's further request for oral argument is denied. No good cause is shown for deviating from our rule that this request "will normally not be granted." 49 CFR 825.25(b).

which he was repatriated. The findings of the law judge based on the latter entries are reversed. Moreover, his consideration of appellant's past seaman offenses over a 30-year span of time is disapproved. In light of our determinations herein, modification of the revocation order is warranted.

The regulation cited in appellant's first contention is 46 CFR 5.30-1(g). It provides that "In the preparation of an appeal, neither the investigating officer nor the administrative law judge will assist the appellant beyond the point of informing him of the proper form to be used and the applicable regulations." Appellant's counsel eliminated the words "neither the investigating officer nor" in quoting this regulation as a requirement for more assistance than was actually received from the law judge.[4] He has simply misread and thus misinterpreted it meaning.[5] The record discloses that appellant was duly apprised of the procedures for appeal (Tr. 14) and sought no further guidance or clarification. Consequently, we find that the law judge fulfilled his regulatory function.

The next argument is that a seaman, acting without counsel, should not be held to "understand the nature and purpose of the subpoena device." Here again, appellant received adequate advice concerning his hearing rights, including the rights to counsel and to have witnesses called in his behalf (Tr. 3). He chose to act on his own and made no request for witnesses. It has not been shown that he was incompetent to decide these matters for himself. On appeal, the only showing is that he lacked knowledge of the whereabouts of witnesses. Since this difficulty was not made known at the hearing, it cannot serve as a basis for ruling that the law judge erred. Similarly, there was no reason to order a medical examination since appellant neither requested it nor produced evid ence to support his claim of illness aboard the DEL SOL (Tr. 11). Therefore, we dismiss three of the contentions raised by appellant as groundless.

Since the logbook entries were made in substantial compliance

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[4]Appellant's brief to the Commandant, p.4.

[5]Contrary to the assertion in appellant's brief to the Board, the regulation if fully and accurately set forth in the Commandant's decision (C.D.5).

with the requirements of 46 U.S.C. 702,[6] they qualify as prima facie evidence of the facts recited therein and impose "upon the seaman the burden of going forward with the evidence." [7] Appellant's mere statement at the hearing that "The Captain, the steward told me I could take the day off..." cannot be deemed to prevail over the entry of September 28, to which his reply was recorded as "None."[8] To the entry concerning his absences on October 8, 9, and 10, his reply was "My rights were abused." There are no replies to the subsequent entries for the obvious reason that appellant was no longer on the vessel. The evidence in rebuttal contains nothing which would excuse appellant's repeated failures to report for work between October 8 and 12.[9] It shows unmistakably, however, that his reason for leaving the vessel was well known to the master although not recited in either of the logbook entries on October 13. The question remains whether appellant had a justifiable fear for his personal safety which entitled him to apply for discharge.

It is established that appellant was attacked by the mate without warning or provocation on October 1. No quarrel or altercation had occurred as was found by the Commandant. The mate, in a drunken condition, was using violent means to collect a ten dollar deft which appellant promptly paid. Even then, the mate later threatened appellant by kicking and breaking his glasses. In our view, these facts represent an adequate showing of the mate's hostility toward appellant, despite the latter's peaceable response throughout the entire incident. Certainly appellant had sufficient grounds to fear being again victimized by the mate in their subsequent encounters if the mate, while drunk, should demonstrate the same animosity.

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[6]Most importantly this statute requires that "the offender, if still in the vessel,... be furnished with a copy of such entry, and have the same read over distinctly and audibly to him, and may thereupon make such a reply thereto as he thinks fit...."

[7]Kelley v.United States, 273 F. Supp. 945, 947(E.D. Va., 1967); 46 CFR 5.20-107.

[8]Since the entry was read to appellant and he then declined the opportunity to make an explanation, this gives "great credence to the factual statements in the...entry...." Keller case, supra, 950.

[9]The port superintendent's letter on October 9, included among appellant's exhibits, states that he was staying at a local hotel in Port Harcout.

The Commandant, in agreeing with the law judge that appellant's fear was "not based upon a reasonable cause," relied on the fact that no repetition of the October 1 incident had occurred during the ensuing week. This reasoning is fallacious if it is meant to imply that further harassments by the ship's officer were required for the appellant to be put in fear. It ignores the evident fact that his well being was not so much threatened while the vessel remained in port as would be the case during the vessel's return voyage at sea.

A seaman may be discharge in a foreign port upon application to an American consular officer. 46 U.S.C. 682. It is then the consular's duty "to institute a proper inquiry" in order to determine whether the seaman's complaint is justifiable and warrants his discharge. 46 U.S.C. 685. Appellant's sought to initiate this process on October 5 and the master's refusal to take him to Lagos, where the United States embassy in Nigeria was located according to appellant's exhibit, is unexplained.

Since the vessel remained at Port Harcourt until October 13, an ample opportunity for the consular inquiry was available. The master appears to have no excuse for avoiding this statutory procedure which should have resolved appellant's complaint. Due to the master's inaction, appellant resorted to other remedies which, although unavailing, further evidence the reality of his fear. Although he must be faulted for ultimately leaving the vessel without authorization,[10] we find his offense mitigated to a substantial degree by the circumstances reflected in this record. The case before us neither requires nor supports any deviation from the scale of average orders in Coast Guard regulations, which provides that "offenses committed within 3 years are to be considered as repeated."[11] Anything this standard, we find only one admonition against appellant in 1973 for failure to perform. To consider offenses prior to the 3-year period as the Commandant did, in order to support a finding that appellant has failed to reform (C.D. 13), would only distort the record. The undisputed evidence in rebuttal provides sufficient grounds for reduction of the sanction heretofore imposed.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appeal be and it hereby is denied except insofar as modification of the Commandant's order is provided for herein;

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[10]Ennis v. Waterman S.S. Corp., 49 F. Supp. 685, 688(S.D.N.Y., 1943).

[11]5 CFR 5.20-165(b), Group A (2).

2. The revocation order of the Commandant be and it hereby is modified to provide for a retroactive suspension of appellant's seaman documents;[12] and

3. The suspension shall terminate on the date of service appearing on the face of this order.

TODD, Chairman, BAILEY, Vice Chairman, McADAMS, HOGUE, and HALEY, Members of the Board, concurred in the above opinion and order.

[12]The revocation order took effect on August 2, 1976, the date on which the Commandant't decision was issued. Appellant held a temporary document, issued pursuant to 46 CFR 5.30-15, while his appeal was pending to the Commandant.